

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

~~ORIGINAL COPY~~

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

607

NO. 22218

ANTHONY LONG

APPELLANT

V.

UNITED STATES OF AMERICA

APPELLEE

Appeal In Forma Pauperis From A Judgment Of The United States
District Court For The District Of Columbia.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 8 1968

Nathan J. Paulson
CLERK

N. Meyer Baker
Mercier, Sanders, Baker & Schnabel
613 Fifteenth Street, N. W.
Washington, D. C. 20005

Francis C. Allen
929 E Street, N. W.
Washington, D. C. 20004

Attorneys for Appellant
(Appointed by this Court)

~~ORIGINAL COPY~~

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

607

NO. 22218

ANTHONY LONG

APPELLANT

V.

UNITED STATES OF AMERICA

APPELLEE

Appeal In Forma Pauperis From A Judgment Of The United States
District Court For The District Of Columbia.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 8 1968

Nathan J. Paulson
CLERK

N. Meyer Baker
Mercier, Sanders, Baker & Schnabel
613 Fifteenth Street, N. W.
Washington, D. C. 20005

Francis C. Allen
929 E Street, N. W.
Washington, D. C. 20004

Attorneys for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether appellant was denied his liberty without due process of law when the police arranged a probable confrontation between the victims of an alleged robbery and appellant, and the Government used identification testimony flowing from such confrontation against appellant at the trial in which he was convicted of said robbery?

2. Whether appellant's juvenile record in the District of Columbia may be used to rebut testimony of appellant's general reputation for peace and good order?

This case has not previously been before this Court under the same or similar title.

IN THE UNITED STATES COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22218

ANTHONY LONG

APPELLANT

V.

UNITED STATES OF AMERICA

APPELLEE

Appeal In Forma Pauperis From A Judgment Of Conviction Of The
United States District Court For The District Of Columbia For
Violation Of Sections 502 And 2901, Title 22, District Of
Columbia Code.

BRIEF FOR APPELLANT

TABLE OF CONTENTS

	Page
Statement of Questions Presented.	i
Table of Authorities	
Cases.	iv
Constitution of the United States.	iv
Statutes.	iv
Jurisdictional Statement.	1
Statement of Facts.	2
Summary of Argument.	7
Argument	
I. Appellant was denied his right to due process of law guaranteed by the Fifth Amendment to the Constitution when he was subjected to a confrontation alone with the complaining witnesses, without a lineup, by a scheme arranged by the police, and when the Government's case in chief relied heavily on identification testimony flowing from such confrontation.	7
II. Appellant's juvenile record in the District of Columbia may not be used to rebut testimony of appellant's general reputation for peace and good order.	20
Conclusion.	22

TABLE OF AUTHORITIES

Cases:

Page

Gilbert v. California, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967)	8
Kent v. United States, 383 U.S. 541, 16 L.Ed. 2d 84, 86 S.Ct. 1045 (1966)	20, 21
*Stovall v. Denno, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967)	8, 9, 11, 15, 16, 20
*United States v. O'Connor, 282 F. Supp. 963 (U.S. D.C. D.C. 1968)	8, 10, 11, 17, 20
United States v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967)	8, 9, 20
Wright v. United States, _____ U.S. App. D.C. _____, _____ F. 2d _____, (D.C. Cir. 1968, No. 20153, 1968)	9

Constitution of the United States:

Amendment V.	7, 20
----------------------	-------

Statutes:

District of Columbia Code, 1967 Ed.

§11-1586(a)	21
§11-1586(e)	21
*§16-2308(d)	21

Cases and authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant was tried in May 1968 in the United States District Court for the District of Columbia and convicted of robbery and assault with a dangerous weapon. The Trial Court allowed his petition for leave to appeal in forma pauperis. This Court has jurisdiction over the appeal by virtue of 28 U.S.C. §1291.

STATEMENT OF FACTS

On May 28, 1968 appellant, Anthony F. Long, was found guilty of robbery and assault with a dangerous weapon. The Government's case in chief consisted, essentially, of the eyewitness testimony of (i) the victim William T. Hayden and (ii) Jerry W. Hayden, the victim's son.

The alleged offenses occurred on December 23, 1967 about 3:50 p.m. in the vicinity of the 300 block of 17th Place, Northeast, Washington, D. C. The victim, William Hayden, was employed by the Thompson Dairy Corporation as a routeman and was, at the time, making deliveries of milk and other dairy products, and was accompanied by his son Jerry Hayden, who was not an employee of the Thompson Dairy Corporation (TR. 15, 39).

At about 3:50 p.m. Mr. Hayden was in the milk truck, while his son was on the porch of 315 - 17th Place, Northeast. Mr. Hayden was approached by two armed male Negro youths, one from either side of the milk truck, who robbed him of about \$280 at gun point.

Appellant allegedly entered the truck from the right hand side and held Mr. Hayden at gun point while the other boy took his wallet and the truck keys. Appellant was allegedly

observed by Mr. Hayden for approximately 20 - 30 seconds, after which time appellant and the other boy allegedly fled, appellant down an alley and the other boy around the block, to a parked automobile and sped away (TR. 22, 40).

The son, Jerry, was alerted to the robbery when his father yelled that he had been robbed and asked Jerry to call the police. Jerry pursued a person alleged to be the appellant, down the alley and saw him face to face only momentarily at a distance of about twenty feet from across a fence. Jerry, then jumped the fence and continued the pursuit until he slipped on a patch of ice as the robbers, approaching from different directions, boarded the waiting auto and sped off. Jerry observed that the first three numbers of the license plate of the getaway car were 337 and that the license plate hung at an angle because it was apparently fastened to the car with only one bolt. He also observed the general color, make and model of the car (TR. 42, 104-108, 111, 122).

The following day Mr. Hayden retraced his route and in the general vicinity of the robbery spotted an auto meeting the general description of the getaway car given by his son. He then telephoned his son to meet him and see the car. When he arrived, the son, Jerry, also identified the car as that used in the getaway. This information was given to the police with,

at this time, the complete license number (TR. 111-113).

On the day of the robbery, both Jerry and Mr. Hayden gave general descriptions of the two robbers and a third person who was seen only in the car. The description of the robber, alleged to be the appellant, was a male Negro youth of 19 - 20 years, about six feet tall and weighing 165 - 170 pounds (TR. 34).

From the automobile registration records, the police determined that appellant's mother was the owner of the auto identified by the Haydens. A detective interviewed appellant's mother and asked who could have been driving the car about 3:50 p.m. on December 23, 1968, and in reply, was told appellant probably drove it (TR. 30).

The detective then arranged for both Mr. Hayden and Jerry to come to the Robbery Squad headquarters at 3:00 p.m. on January 13, 1968. Thereafter, the officer phoned appellant's mother and asked that she have appellant also appear at the Robbery Squad at 3:00 p.m. on January 13, 1968. He told her the police wanted to talk to appellant about a robbery involving, they thought, appellant's mother's automobile. He advised the mother that they could bring a lawyer if they desired, and that appellant's appearance was not compulsory - the police apparently wanted only to talk to him about the alleged robbery. The officer also advised her that both complainants would be present (TR. 30).

Appellant arrived at the Municipal Building about 3:15 p.m. on January 13, 1968 and was allegedly recognized at the elevator by Mr. Hayden who was, at the time, on his way to the Robbery Squad. After allegedly recognizing appellant, Mr. Hayden boarded the same elevator with appellant and proceeded to the Robbery Squad office. Upon arrival at the Robbery Squad, Mr. Hayden told no one that he had recognized appellant at the elevator (TR. 16-19).

While appellant, Mr. Hayden and the son, Jerry, who had arrived about fifteen minutes earlier, were in the same room, separated by a distance of approximately fifty feet, Jerry Hayden looked up from a photo book he had been looking through and pointed out appellant to Mr. Hayden as looking like one of the robbers, and Mr. Hayden agreed. Shortly thereafter they were asked by one of the police officers in the room if they recognized anyone and they pointed out appellant. At that time there were perhaps as many as ten - twelve persons in the room, most of whom were police detectives in plain clothes (TR. 16, 19, 33).

Some time later that afternoon, appellant was arrested for robbery and assault with a dangerous weapon. He was then advised by the police of his rights and called his attorney (TR. 34, 35).

At trial, appellant moved to suppress identification testimony of both the Haydens on the grounds of denial of his Fifth Amendment right of due process and his Sixth Amendment right to counsel.

The motion was denied and the testimony entered in the case against appellant (TR. 3, 50-54).

At trial, appellant sought to introduce, through several witnesses, testimony relating to his general reputation for peace and good order. At a bench conference, out of the presence of the jury, appellant's attorney was advised by the Court that if such testimony were introduced, the United States attorney would be permitted to use appellant's juvenile record in cross-examination of such witnesses to rebut such testimony. Appellant's trial counsel argued that such use of appellant's juvenile record is proscribed by the very legislation setting up the juvenile court system and by numerous cases. Counsel was given an opportunity to give the Court the benefit of such cases, but was unable to find any such case. After this argument, the Court ruled that the juvenile record of "convictions" would be available to the United States attorney if the defense put on testimony regarding appellant's reputation for peace and good order (TR. 139-151, 167-170).

Trial counsel then, as a matter of strategy, decided not to put on the character testimony, since the defense was essentially "mistaken identity" and there existed the very great danger that appellant would be convicted on his juvenile record and not on the merits of the Government's case.

Appellant was found guilty on both the robbery and assault with a dangerous weapon counts, received a suspended sentence, and placed on probation for five years (TR. 248, 259).

SUMMARY OF ARGUMENT

I. Appellant was denied his liberty without due process of law when he was convicted of robbery and assault with a dangerous weapon because:

- (i) the Government's case in chief consisted primarily of the eyewitness testimony of two witnesses; and
- (ii) such testimony flowed from a confrontation with appellant under circumstances highly suggestive of appellant's guilt and the use thereof against appellant is, therefore, proscribed by the Fifth Amendment to the Constitution of the United States.

II. The threatened use of appellant's Juvenile Court record to impeach character witness testimony, if introduced, forced appellant unfairly to abandon his plan to introduce such testimony at trial. Such use of records of the Juvenile Court are clearly proscribed by the very statute creating such court.

ARGUMENT

I. Appellant was denied his right to due process of law guaranteed by the Fifth Amendment to the Constitution when he was

subjected to a confrontation alone with the complaining witnesses, without a lineup, by a scheme arranged by the police, and when the Government's case in chief relied heavily on identification testimony flowing from such confrontation.

In Stovall v. Denno, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), the Supreme Court observed that in cases where a confrontation is conducted in a manner so unnecessarily suggestive and conducive to irreparable mistaken identification, such practice is recognized as ground of attack as a denial of due process. The Court went on to add: "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it"

On the same day that the Supreme Court decided Stovall, it also decided United States v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967), and Gilbert v. California, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967). These three cases form what Judge Gasch of the United States District Court for the District of Columbia has characterized, "a trilogy which indicates the concern of the Supreme Court over 'line-up' and 'show-up' procedures that might lead to a mistaken identification of a suspect by a witness who is prejudicially amenable to the power of suggestion." United States v. O'Connor, 282 F. Supp. 963 (1968).

In Wade the Supreme Court outlined in detail the ills at which Stovall was directed. After commenting on the vagaries of

eyewitnesses, the Court dealt with the power of suggestion and quoted, with apparent approval, from Wall, Eyewitness Identification in Criminal Cases 26: "The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined." The Court then found:

Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial and thus his susceptibility to suggestion the greatest.

One of the first cases¹ in point brought before the United States Court of Appeals was Wright v. United States, _____ U.S. App. D. C. _____, _____ F. 2d _____, (D. C. Cir. 1968, No. 20, 153). Recognizing the principles set forth in Stovall and Wade, the Court refused to rule on the merits of a Stovall challenge without amplification of the record in the subject case as to several significant factors. In remanding the case, the Court suggested the nature of some of the missing details.

¹There are two cases presently before this Court involving Stovall objections to identification testimony: Hines v. U. S., (No. 21249), and Clark v. U. S., (No. 21001).

From this foundation, Judge Gasch compiled the following partial list of factors to be considered in determining whether there exists, in a given case, aspects which are unnecessarily suggestive and conducive to irreparable mistaken identification:

1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?
2. Where did the confrontation take place?
3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?
4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?
5. Were any tangible objects related to the offense placed before the witness that would encourage identification?
6. Was the witness' identification based on only part of the suspect's total personality?
7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

8. Was the emotional state of the witness such as to preclude objective identification?

9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

United States v. O'Connor, 282 F. Supp. 963 (U.S. D.C. D.C. 1968).

Focusing now on the factual situation of the case against appellant, Anthony Long, there are at least two, and possibly three, confrontations to measure against the "totality of the circumstances" test set forth in Stovall and the criteria for such measure stated in O'Connor:

(1) The confrontation between the victim William T. Hayden and appellant at the elevator of the Municipal Building and the possible identification allegedly based thereon;

(2) The confrontation between the victim William T. Hayden and appellant in the Robbery Squad office and the alleged identification based thereon; and

(3) The confrontation between the victim's son Jerry Hayden and the appellant in the Robbery Squad office and the alleged identification based thereon.

A. THE CONFRONTATION BETWEEN WILLIAM HAYDEN AND APPELLANT AT THE ELEVATOR AND THE POSSIBLE IDENTIFICATION BASED THEREON.

At trial, before the Court and out of the presence of the jury, questions were raised by defense counsel regarding identification testimony sought to be introduced by the Government. In reply to such examination, Mr. Hayden stated that in route to the Robbery Squad office on January 13, 1968, he encountered, at the first floor elevator of the Municipal Building, one of the men who robbed him (TR. 16). He further stated that he rode in the same elevator with that person up to the third floor where the Robbery Squad is located (TR. 16). Upon arriving at the Robbery Squad office, Mr. Hayden was taken to the back of the room to look at some photos with his son, who had arrived some time earlier (TR. 16).

At no time did Mr. Hayden independently tell any policeman or his son that he had seen one of the men who robbed him (TR. 18-19). The first time Mr. Hayden identified appellant to anyone was when his son saw appellant some fifty feet away in the Robbery Squad office and said, "that looks like the man (who robbed Mr. Hayden) over there" and William Hayden agreed (TR. 19, 27, 46).

Thereafter Mr. Hayden, for the first time, mentioned the encounter at the elevator.

Commenting on the admissibility of William T. Hayden's identification testimony surrounding the alleged confrontation at the elevator, the Court stated:

"[I]t is perfectly clear that the identification by Mr. Hayden was of such a nature as not to be suggestive in any way, shape or form. He comes into the Municipal Center which has hundreds of people in it, and in the elevator on the first floor he sees the defendant under circumstances that are no wise suggestive or prejudicial" (TR. 52).

Accepting, arguendo, the Court's characterization of the circumstances under which the confrontation took place as being in no wise suggestive or prejudicial, there remains the most critical question, was there at that time any identification at all?

William Hayden had been requested to come down to the Robbery Squad in connection with the alleged robbery. After allegedly recognizing one of the robbers at the elevator on the first floor, Mr. Hayden boarded the elevator with that person, went to the Robbery Squad office where he encountered Detective Martin Hannon, Mr. Hayden's son Jerry and two other members of the Robbery Squad, and at no time said one word to any of them about seeing one of the robbers at the elevator on the first floor (TR. 16-19). It

seems crystal clear that Mr. Hayden's actions, or failure to act, after the encounter at the elevator indicate very positively and objectively that Mr. Hayden, at the elevator, did not recognize appellant as one of the robbery suspects. To assume, as the trial court must have done, that the victim of a robbery, asked to appear at police headquarters in connection with that robbery, and who encountered one of the robbers whose identity was unknown to the police, would fail to mention such encounter to one of the three detectives he saw thereafter or to his own son who was with him at the time of the robbery, is beyond reason. The only recognition of appellant by Mr. William T. Hayden was manifested under circumstances, described below, highly suggestive and prejudicial to appellant.

B. THE CONFRONTATION BETWEEN WILLIAM T. HAYDEN AND APPELLANT IN THE ROBBERY SQUAD OFFICE.

In the Robbery Squad office, William T. Hayden did not identify appellant independently, but rather, merely agreed with the possible identification made by his son (TR. 19). The first time Mr. Hayden identified appellant, was when his son pointed to appellant standing some 45 - 50 feet away and said, "that looks like one of the men", or words to that effect. Only after this identification did Mr. Hayden reply that appellant was one of the robbers (TR. 19, 46).

Since the objections to Jerry Hayden's identification and the objections to William T. Hayden's identification are essentially identical, no further comment will be made here on William T. Hayden's Robbery Squad identification but rather that identification will be questioned on the same grounds as the son's identification set forth in detail below.

C. THE CONFRONTATION BETWEEN JERRY HAYDEN AND APPELLANT IN THE ROBBERY SQUAD OFFICE.

The conviction of the defendant in Stovall was upheld in spite of the fact that the police took defendant alone and under arrest to the hospital bed of the identifying witness. In upholding that conviction, the Supreme Court found extenuating circumstances and adopted the finding of the Court of Appeals, 355 F.2d, at 735, as follows:

"Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to

the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question."

In the instant case against appellant, Anthony Long, there existed no such extenuating circumstances foreclosing the possibility of a lineup. In Stovall the witness was critically injured and on the threshold of death. Here both identifying witnesses were apparently of reasonably good health - sufficient at least to come down to the Robbery Squad office (TR. 15, 44). The identifying witnesses were not, as in Stovall, the only persons who could exculpate appellant. On the contrary, they were the only persons who could inculcate him. Appellant was entitled to a lineup, including others of his same general characteristics.

Turning now to the question of suggestivity in the confrontation and identification process employed in this case, a number of facts become critical.

- (1) Detective Hannon arranged to have appellant and the two identifying witnesses appear at the Robbery Squad office at 3:00 p.m. on January 13, 1968 (TR. 16, 30, 37), a situation highly conducive to a "chance confrontation" without a lineup.
- (2) There were apparently no other Negro males of approximately 19 - 20 years, six feet tall, and weighing approximately 165 - 170 pounds present (TR. 23, 34).
- (3) The complaining witnesses had described, on the day of the alleged robbery, one of the three robbers as Negro,

male, six feet tall and weighing approximately 165 - 170 pounds (TR. 23, 34).

- (4) William T. Hayden's first identification of appellant as one of the robbers was in response to the observation of Mr. Hayden's son, "[T]hat looks like the man over there" (TR. 19, 46).

Applying the criteria set forth by Judge Gasch in O'Connor, it appears clear that such confrontation was most suggestive and, therefore, prejudicial to appellant. Taking these criteria one by one:

1. Was the defendant the only one that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of confrontation so as to negate the assertion that he was shown alone to the witness?

The only person in close proximity to the appellant when he was identified was Detective Hannon, himself obviously known by both complaining witnesses to be a police officer. There was no one else remotely resembling appellant in the room (TR. 23-27, 47-48). Appellant was, therefore, shown alone to the complaining witnesses, to appellant's prejudice.

2. Where did the confrontation take place?

The confrontation took place in the Robbery Squad office. Appellant was seen being interrogated by Detective Hannon (TR. 24, 46 & 48), a condition highly suggestive and

prejudicial to appellant.

3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?

Absolutely not. In fact, Detective Hannon stated that his intention, when he asked appellant to come down to the Robbery Squad office, was to hold an impromptu lineup in order to exonerate appellant (TR. 33).

However, the transcript is devoid of any testimony indicating that Detective Hannon took any precautions to prevent the occurrence of exactly such a confrontation as happened. Detective Hannon's testimony leads one to conjecture as to whether he purposely, or inadvertently, staged the confrontation which did occur.

4. Was the witness aware of any observation by another or evidence indicating the guilt of the suspect at the time of confrontation?

In the case of William T. Hayden the answer is emphatically yes. His only identification of appellant to any person other than himself came in response to the identification made by his son (TR. 19 & 46) (unfortunately, there was no testimony taken relating to the reasons Detective Hannon

gave the complaining witnesses for having them come down to the Robbery Squad office). Again, suggestive and prejudicial to appellant.

5. (No prejudicial aspect).

6. (No prejudicial aspect).

7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

Yes, the son said (from a distance of about 45 - 50 feet), "that looks like the man", and the father replied, "Yes, that's the man" (TR. 19 & 46).

8. (No prejudicial aspect).

9. (No prejudicial aspect apparent from the record).

10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection so clear as to insulate him from a tendency to identify on a less than positive basis?

Neither complaining witness saw the alleged robber's facial features at close range for more than 20 - 30 seconds (TR. 22, 40-42). Again, we reiterate, William T.

Hayden allegedly saw appellant at the elevator, rode up three floors in the same elevator with him, and yet failed to mention this incident to at least three Robbery Squad detectives and his own son.

By the standards set forth in Wade, Stovall and O'Connor, the identification testimony of both complaining witnesses based on the Robbery Squad office confrontation was so tainted, as indicated by the totality of the surrounding circumstances, that it should have been suppressed. Failure so to suppress, denied appellant his right not to be denied life, liberty or property without due process of law, guaranteed him by the Fifth Amendment to the Constitution of the United States.

II. Appellant's juvenile record in the District of Columbia may not be used to rebut testimony of appellant's general reputation for peace and good order.

The Supreme Court of the United States has accepted one opportunity to hear a case involving the Juvenile Court Act of the District of Columbia in Kent v. United States, 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966). Although the question of use of a juvenile record against the child was not the issue in that case (nor have we been able to find a case in point in any federal or state court), the Court did, nonetheless, quote extensively from legal scholars and commentators on the underlying philosophy of juvenile courts.

The objective of statutes creating such courts is rehabilitation,

not punishment. Actions brought in such courts are more akin to civil actions than criminal. The State is in the role of *parens patriae* towards the child, not judge and jury. Kent, 383 U.S., at 554, 555.

With this expression of the underlying philosophy of the juvenile court systems by the Supreme Court, we direct the attention of this Court to the following three provisions of the D. C. Code pertaining to the use of juvenile records:

D. C. Code 1967 Ed.

§11-1586(a) states, in significant part, that records shall be kept of all actions brought before the Juvenile Court and that such records shall be withheld from indiscriminate public inspection, open only to respondents, their parents or guardians and their duly authorized attorneys, and the institutions to which the child may be committed.

§11-1586(e) specifically enables the clerk to furnish copies of such records, upon request, to the United States attorney for the District of Columbia for use as evidence in nonsupport proceedings.

(There are no other permitted uses afforded the United States attorney that we have been able to find in a diligent search of the D. C. Code.)

Finally, §16-2308(d) states, in effect, that no adjudication nor any evidence received in any juvenile case may be used against the juvenile in any proceeding in any other court.

In view of (i) the underlying philosophy of the juvenile court system, (ii) the specific use of the juvenile record Congress saw fit expressly to permit the United States attorney, and (iii) the absence of any other such permitted use, it seems clear that Congress intended to protect the juvenile and, perhaps more importantly, the integrity of the juvenile court system, and that, therefore, the Trial Court erred in instructing trial counsel that appellant's juvenile record could be used to rebut testimony of his general reputation for peace and good order.

Trial counsel was then wrongfully forced to decide whether he should risk the possible harmful effects appellant's juvenile record might have on the jury, or whether he should omit testimony to appellant's reputation for peace and good order.

It is submitted that the integrity of the juvenile court system itself was intended to be protected by Congress. Appellant could not waive his rights to protection of his juvenile record afforded by the D. C. Code, for such waiver would, necessarily, jeopardize the integrity of the court which, we think, Congress sought to protect.

CONCLUSION

Appellant respectfully requests this Court to find that the trial court erred in:

- (1) admitting into evidence the identification testimony of

William T. Hayden and Jerry Hayden; and

(2) instructing defense counsel that appellant's juvenile record could be used against appellant; and that such errors resulted in prejudice to appellant.

Therefore, appellant respectfully requests this Court (i) to reverse the verdict of the trial court and set aside sentence imposed thereunder; or in the alternative, (ii) to remand the case to the trial court to determine whether or not the trial identification of appellant by William Hayden and/or Jerry Hayden had a source outside the pretrial confrontations, with directions that should the trial court find no such outside source of the trial identification, then the verdict of guilty as to both counts be reversed and sentence set aside, or if the trial court shall determine that such identification has an origin outside the objectionable confrontations then appellant be granted a new trial, at which he be allowed to introduce testimony to his reputation for peace and good order free of the threat of the use of his juvenile record in rebuttal.

Respectfully submitted,

N. Meyer Baker
Mercier, Sanders, Baker & Schnabel
613 Fifteenth Street, N. W.
Washington, D. C. 20005

Francis C. Allen
929 E Street, N. W.
Washington, D. C. 20004

Washington, D. C.

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served appellant's brief upon each of the following parties in this proceeding by delivering a copy thereof by hand to the office of counsel of record of the party named:

Party

United States of America

Attorney

Frank Q. Nebeker, Esq.
Assistant U. S. Attorney
U. S. Court House
Washington, D. C.

Francis C. Allen
Attorney for Appellant
929 E Street, N. W.
Washington, D. C. 20004

November 8, 1968

35-4
3-27-67

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,218

ANTHONY LONG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1969

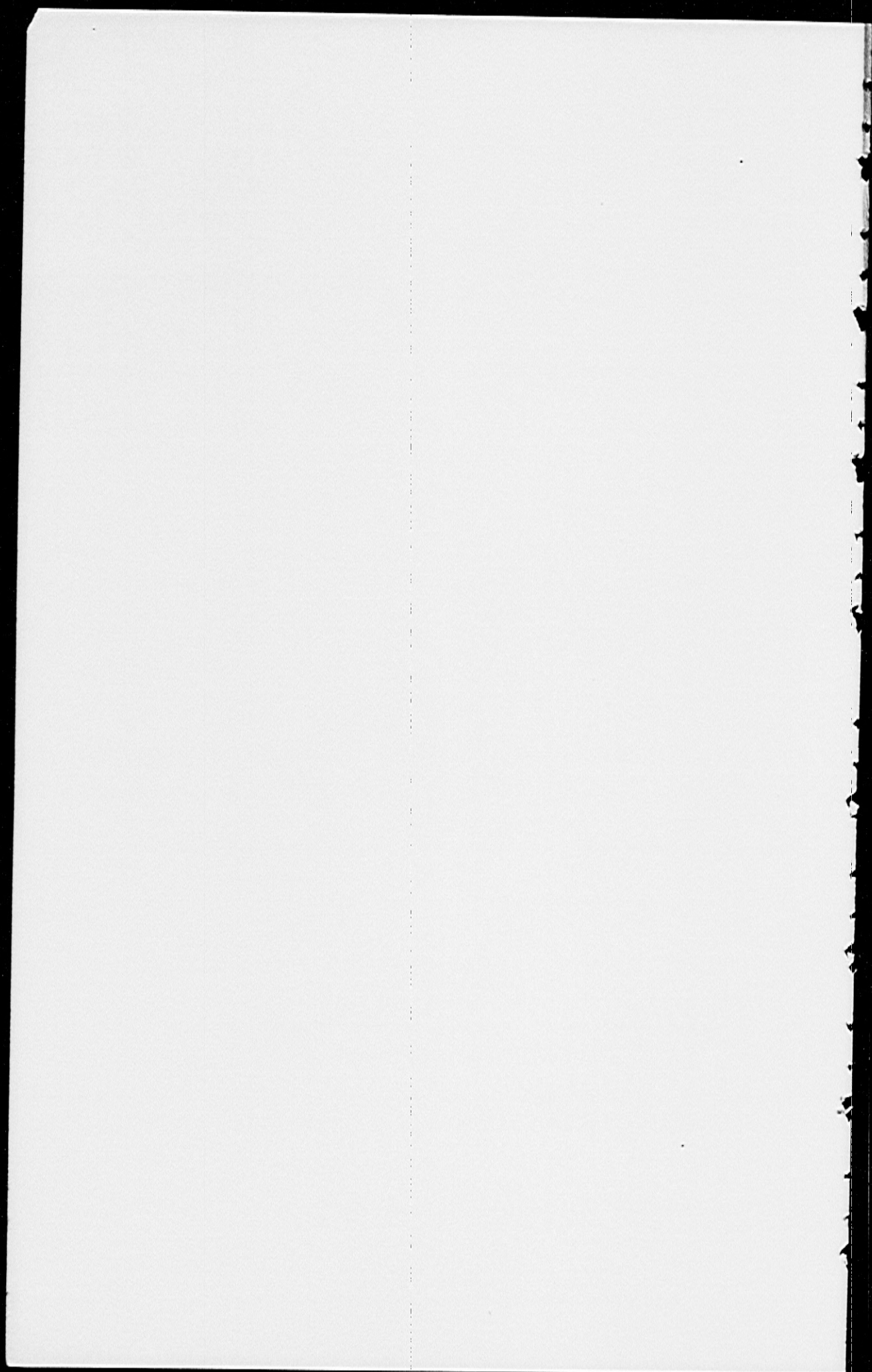
Nathan J. Paulson
CLERK

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES A. STRAZZELLA,

CLARENCE A. JACOBSON,
Assistant United States Attorneys.

Cr. No. 233-68



INDEX

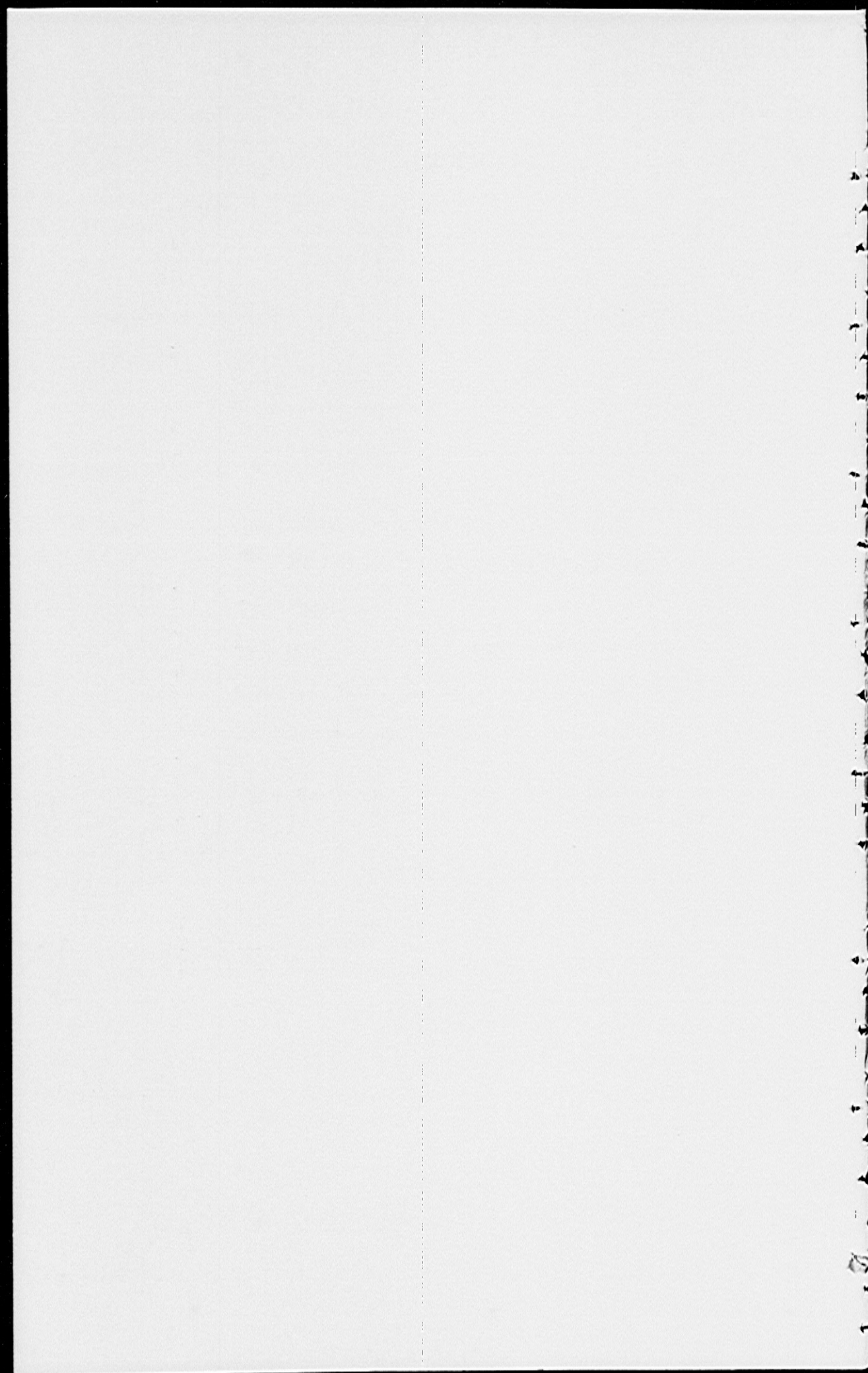
	Page
Counterstatement of the Case _____	1
Argument:	
I. The January 13 confrontations did not taint the in-court identifications so as to require reversal under <i>Wade-Stovall</i> _____	4
II. Judge Hart's ruling permitting Government counsel to question defense character witnesses about Appellant's juvenile arrests was not error _____	6
Conclusion _____	8

TABLE OF CASES

<i>Awkard v. United States</i> , 122 U.S. App. D.C. 165, 352 F.2d 641 (1965) _____	6
<i>Clemons v. United States</i> , No. 19,846 (decided December 6, 1968) _____	5
<i>Williams v. United States</i> , No. 21,270 (decided December 20, 1968) _____	5
<i>Hemphill v. United States</i> , — U.S. App. D.C. —, 402 F.2d 187 (1968) _____	5
<i>McCloud v. United States</i> , No. 21,867 (decided October 31, 1968) _____	6
<i>Michelson v. United States</i> , 335 U.S. 469 (1948) _____	6
<i>Patton v. United States</i> , No. 21,161 (decided October 29, 1968) _____	6

OTHER REFERENCES

11 D.C. Code § 1586(a) _____	7
11 D.C. Code § 1586(c) _____	7
16 D.C. Code § 2308(d) _____	7



ISSUES PRESENTED *

In the opinion of Appellee, the following issues are presented:

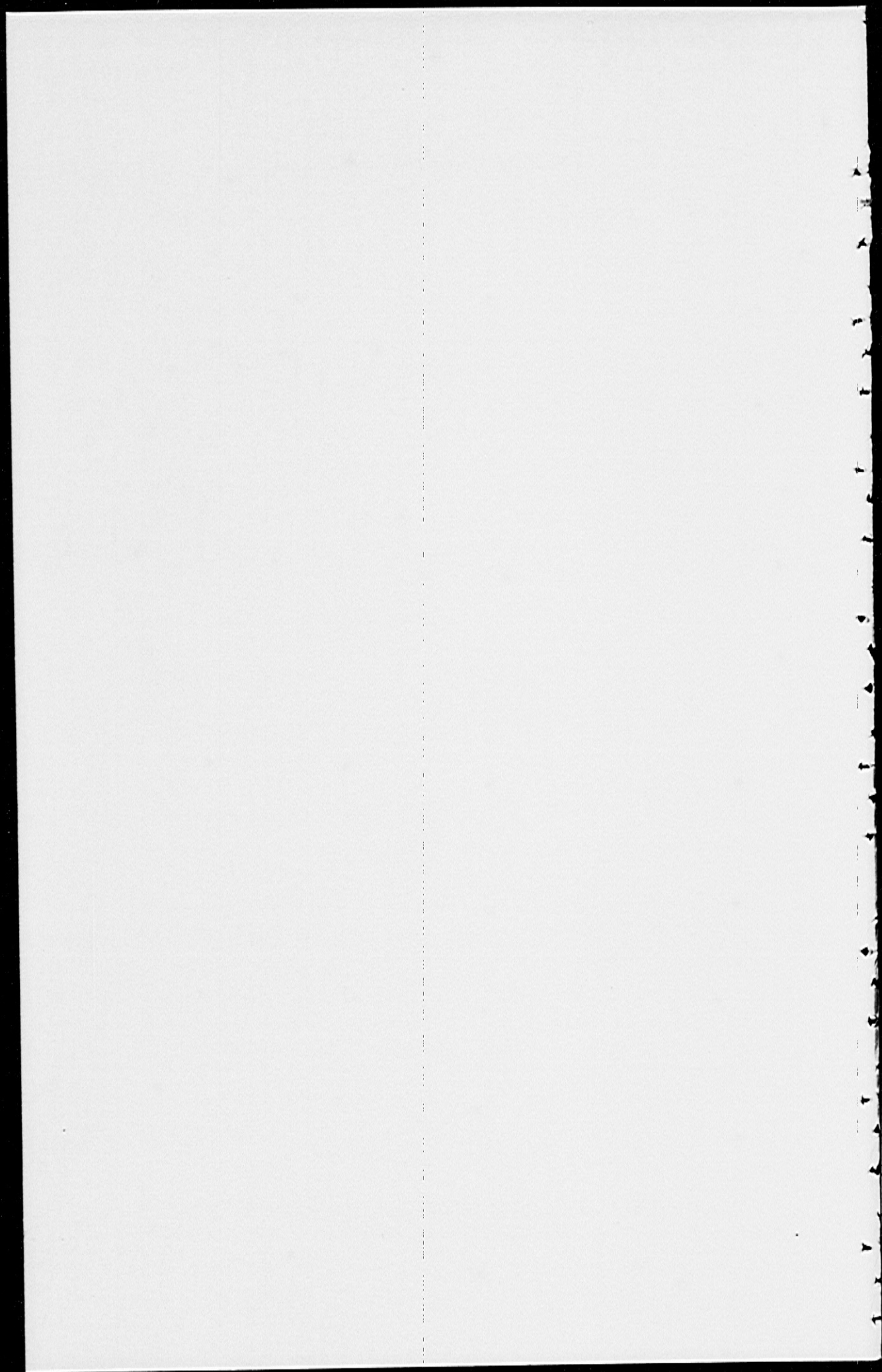
I. Were the pre-trial confrontations between Appellant and two Government witnesses, which occurred at the elevator of the Municipal Building and in the robbery squad office, in violation of Appellant's *Wade-Stovall* rights where

- (a) both confrontations occurred prior to Appellant's arrest,
- (b) Appellant had notice that he could bring an attorney and was not in a position not to be able to afford one,
- (c) Appellant voluntarily came to the Municipal Building,
- (d) one witness fortuitiously saw and recognized Appellant while waiting for an elevator to get to the police arranged meeting at the robbery squad office, and
- (e) the other witness fortuitiously saw and recognized Appellant in the robbery squad office, in which many other persons in civilian clothes were present, before an intended impromptu lineup could be set up?

II. Was it error for the trial judge to rule that Government counsel could cross-examine Appellant's proffered character witnesses on the basis of two of Appellant's juvenile arrests where

- (a) Appellant had turned 18 less than three months prior to the current offense, and
- (b) Appellant had a long list of juvenile arrests?

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,218

ANTHONY LONG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 27 and 28, 1968, 18 year old Appellant was tried by jury before Judge George L. Hart, Jr., on charges of robbery and assault with a dangerous weapon. The charges arose out of a December 23, 1967 incident in which William Hayden, a Thompson's Dairy truck driver, had \$280 taken from him at gunpoint while he was at a stop on his delivery route. The jury found Appellant guilty on both charges and Judge Hart placed him on 5 year probation. In this appeal Appellant makes a *Wade-Stovall* challenge to the identifications made by two Government witnesses and also asserts that it was reversible error for Judge Hart to rule that the Government could

use two of Appellant's juvenile arrests to counter character testimony put on by the defense.

The facts relating to the issues raised may be summarized as follows. On December 23, 1967, around 3:50 p.m., William Hayden was inside his Thompson's Dairy delivery truck in front of 315 17th Place, N.E. His son was helping him that day and had gone up to 315 to make a delivery. Two men entered the truck, both armed with pistols. One relieved Mr. Hayden of his wallet containing \$280 and the other, later identified as Appellant, put his gun to Mr. Hayden's head and said he should blow his brains out. Mr. Hayden was alone with the two men for about thirty seconds, they were unmasked, it was light out, and he got a good look at the one who put a gun to his head. The robbers then took flight in different directions, and Mr. Hayden shouted to his son that he had been robbed. (Tr. 62-69.)

The son saw one of the robbers (also later identified as Appellant) running into an alley along the side of 315. The son ran over to the alley and as he got there the robber turned and faced him. The son gave chase down the alley but slipped on some ice. He was able to see the man get into a car at the other end of the alley and speed off. He was careful to take note of the car, a light brown four door sedan, 1962 Chevrolet, with a license plate that began with the numbers 337 and hung crooked because bolted on only one side. (Tr. 103-111.)

The Haydens reported the robbery to the police and gave a detailed description of the one later identified as Appellant, including approximate age (18 or 19), weight, height, and clothing (wearing a black leather jacket) (Tr. 87-88). The next day Mr. Hayden retraced his delivery route and several blocks from the robbery, saw a car matching the description given by his son. (Tr. 74.) His son came over and confirmed that it was the same car (Tr. 75). The police were notified and the ownership was traced to Mrs. Roberta Long, Appellant's mother (Tr. 127). The police contacted Mrs. Long and asked her about who had the car on the afternoon of December 23 (Tr. 30).

Detective Martin J. Hannon, in charge of the case for the police, arranged to have the Haydens and Appellant come down to the robbery squad office on January 13, 1968, with the intention of holding an impromptu lineup (Tr. 33). In arranging for the confrontation, he contacted Mrs. Long, told her that he would like her son to come down to the office in connection with a robbery report and advised her that she could bring a lawyer with her (Tr. 30).

Mr. Hayden's son was the first to arrive on the 13th and was taken to the back of the robbery squad office to look at photographs. When Mr. Hayden arrived, he saw Appellant at the elevator on the first floor of the Municipal Building and immediately recognized him as one of the robbers (Tr. 21). He then went up to the robbery squad office and before he could tell anyone of seeing Appellant, was taken to the back of the office also to look at photographs (Tr. 31). There were about a dozen other persons in the office, some in civilian clothes, some Negro (Tr. 19-20, 24-25, 47-48). Appellant soon entered the office and began talking with a detective. The police had neither talked to the Haydens about Appellant nor shown them a photograph of him prior to his arrival (Tr. 19, 47). The son looked up, saw Appellant across the room and said he looked like one of the robbers (Tr. 46). Mr. Hayden then looked up and confirmed his son's observation (Tr. 19). It was only after that identification that Appellant was placed under arrest (Tr. 34). Both Haydens identified Appellant at trial. No mention was made of the precinct identification in front of the jury.

After the close of the Government's case, Appellant's counsel indicated that he would be presenting witnesses who would testify as to Appellant's good reputation for peace and good order. Government counsel informed the court that although Appellant as an adult had no convictions or arrests other than that related to the current case,¹

¹ Appellant turned 18 less than 3 months prior to the current offense (Tr. 150).

he had numerous juvenile arrests, including assault and carrying a dangerous weapon. Government counsel advised that if character testimony was put on, he desired to question the witnesses regarding the arrests. Judge Hart ruled that the Government would be permitted to question as to only the two most recent arrests (Tr. 147-48).

The first day of trial ended with the first character witness still on the stand and before Government counsel inquired regarding the arrests. The following day, the witness completed his testimony and Government counsel declined to question about the arrests. No further character witnesses were called. The testimony by Appellant's mother included the statement that he had on a black leather jacket when he left home on December 23 (Tr. 172), thereby lending corroboration to the Haydens' identification of Appellant as the black jacketed robber. Appellant did not testify.²

ARGUMENT

I. The January 13 confrontations did not taint the in-court identifications so as to require reversal under *Wade-Stovall*.

(Tr. 19-25, 30-34, 46-47, 62-69, 74-75, 87-88, 103-111, 127, 172)

Appellant asserts that the January 13 confrontations between him and the Haydens were violative of his due process and counsel rights. The claim should not prevail.

² A defense of mistaken identity was attempted on the basis of the length of Appellant's hair. Both Haydens testified that Appellant's hair was much shorter at the time of the robbery than it was at trial. The two defense witnesses, one a good friend of Appellant, the other his mother, testified that if anything Appellant's hair was longer on December 23 than at trial and that it had remained long between December 23 and trial (Tr. 159-60, 174). Their testimony was rebutted by that of Detective Bertrell Jefferson who was present at the January 13 confrontation and arrest and testified that Appellant's hair was much shorter at that point. A photograph taken of Appellant when arrested was presented into evidence which apparently confirmed Detective Jefferson's observation. (Tr. 191-93, 208.)

As to due process and the identification by Mr. William Hayden, Appellant's claim has no merit. Mr. Hayden's key post-offense identification took place not in the robbery squad office under police auspices, but at the elevator prior to entry to the police office. It was a chance meeting outside the control of the police and as such lacked any handle for a *Stovall* inquiry.³ That Mr. Hayden's power of identification was shaped if at all by the elevator observation and not by the subsequent office confrontation is made clear by Mr. Hayden's statement that he recognized Appellant right away at the elevator.⁴

The son's identification in the robbery squad office is less clean but still free of due process taint. Nothing had been said or shown to the son concerning Appellant prior to the son's seeing him. The police intention was to hold an impromptu lineup. Before that could be done, the son looked up and saw Appellant across the room and recognized him. There were others in the room, of Appellant's race and in civilian clothes. Under similar circumstances, this Court has held such an identification to be untainted.⁵

The confrontations were also not in violation of Appellant's right to counsel. It is by no means clear that the constitutional right to counsel attaches to such a pre-arrest, voluntary, investigatory confrontation. At least right to counsel should not be deemed to cover the elevator confrontation, a completely fortuitous meeting outside

³ See *Hemphill v. United States*, — U.S. App. D.C. —, —, 402 F.2d 187, 192 (1968). The fortuity of the elevator meeting cannot be dismissed as in itself suggestive. Compare *Williams v. United States*, No. 21,270 (decided December 20, 1968), slip op. p. 17.

⁴ Appellant has suggested that the solid identification at the elevator is questionable because Mr. Hayden did not tell the police about it upon arriving at the robbery squad office. His omission is explainable by the fact that he was rushed right to the back of the office to look at photographs upon his arrival. It is also clear that Judge Hart found Mr. Hayden's credibility beyond question regarding the elevator confrontation (Tr. 38).

⁵ *Clemons v. United States*, No. 19,846 (*en banc*) (decided December 6, 1968) slip op. pp. 21-24.

police control. Moreover, the police had notified Appellant by way of his mother ⁶ that he could be accompanied by an attorney at the robbery squad office meeting. Appellant chose not to exercise that option. Any possible infirmities in the son's confrontation based on due process or counsel grounds should be resolved as harmless due to the corroboration of Mr. Hayden's clean elevator identification ⁷ and the substantial circumstantial corroboration of the getaway car being traced to Appellant and Appellant's having a black leather jacket, matching the Haydens' description of the robber, on the date in question.⁸

II. Judge Hart's ruling permitting Government counsel to question defense character witnesses about Appellant's juvenile arrests was not error.

(Tr. 147-150)

Judge Hart's ruling was in a line with governing judicial authority which permits under appropriate circumstances cross-examination of character witnesses on the basis of an accused's prior arrests.⁹ The trial judge is charged with exercising his discretion so as to assure that the probative value of the arrests outweighs prejudice to the accused. Judge Hart did this ¹⁰ and moved to minimize

⁶ That notice to the mother was a reasonable method of notifying Appellant is indicated by the fact that appellant had just turned 18 and had been living with his parents (Tr. 249-50). It should be noted that Appellant was represented by retained counsel at trial, so the notice should not be deemed ineffective due to inability to afford counsel.

⁷ See *Patton v. United States*, No. 21,161 (decided October 29, 1968) slip op. pp. 4-5, note 3.

⁸ *McCloud v. United States*, No. 21,867 (decided October 31, 1968).

⁹ *Michelson v. United States*, 335 U.S. 469 (1948); *Awkard v. United States*, 122 U.S. App. D.C. 165, 352 F.2d 641 (1965).

¹⁰ Judge Hart pointed up the unsoundness of a ruling precluding Government counsel from questioning at all in the following bench aside to Appellant's attorney who was arguing for such a ruling (Tr. 143):

[Footnote continued on page 7]

possible prejudice to Appellant by limiting Government counsel's scope of questioning to Appellant's two most recent arrests.

The fact that the arrests occurred while Appellant was a juvenile should not affect the propriety of Judge Hart's ruling. The statutory provisions relied on by Appellant,¹¹ all of which support the confidentiality of Juvenile Court proceedings, are not applicable to the question here. It is arrests, a police function rather than a Juvenile Court function, that is involved.¹² The confidentiality provisions of the Juvenile Court statute cover only Juvenile Court proceedings. The evidence rule regarding countering character testimony with prior arrests makes no distinction between adult and juvenile arrests. Whatever residual insulation attaches to a juvenile status outside the statute should certainly be deemed waived when the accused chooses to make use of character evidence.¹³

¹⁰ [Continued]

THE COURT: I will recess until 3:00 o'clock, and you get a case that shows me when you put somebody on the stand at 18, to testify to his peace and good order, that you can't ask that witness if he knows at 17½ that he had a gun in somebody's ribs.

No case has been found by Appellant, either at trial or on appeal.

¹¹ D.C. Code §§ 11-1586(a), 11-1586(c) and 16-2308(d).

¹² Although Appellant did have at least one finding of involvement before the Juvenile Court, Judge Hart's ruling permitted questioning only as to arrests.

¹³ The claim raised may also be rejected as moot, since Government counsel never in fact questioned the character witness about the arrests, or as harmless, since Appellant's counsel argued good character to the jury (Tr. 220) without response by Government counsel and since any amount of character testimony would likely have been futile in light of the strength of the Government's case and the solid impeachment of Appellant's witnesses by the rebuttal evidence of Detective Jefferson's observation corroborated by the arrest photograph. See note 2, *supra*.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES A. STRAZZELLA,
CLARENCE A. JACOBSON,
Assistant United States Attorneys.

